

Persons who permanently affix tangible personal property to real estate act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. See 86 Ill. Adm. Code 130.1940. (This is a GIL).

December 1, 1999

Dear Xxxxx:

This letter is in response to your letter dated August 25, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

The purpose of this letter is to request guidance regarding a specific fact pattern as set forth below. The situation involves a carpet retailer that sells carpet with installation that requires 'tacking' (such as the standard installation for carpeting). It is my understanding effective November of 1998 Section 130.1940 was amended and as amended the retailer is considered a construction contractor and responsible for the Use tax based on their cost price of the materials. No longer will the carpet be subject to the Retailers' Occupation tax and as such the seller will not collect sales tax based on the selling price of the carpet from the purchaser. The invoice of the seller will show sales tax at \$0. It is my understanding that only carpet sales of area rugs will be subject to the Retailers' Occupation tax .

I have checked with many of the larger retailers in the Chicago area and they are still charging and collecting sales tax. I would think that they have sufficient funds and staff to stay current with any change of law. I am further confused due to the change in the law not making sense from an economic standpoint as I would estimate that the State's revenue will be reduced by 50% on carpet transactions. I also have not seen anything in writing other than the amended code section. It is my understanding that the amendment was not published in a bulletin. Please provide written confirmation of this change for our client's file as we would like to conform to these changes as soon as possible. We do not want to change and later find out that our interpretation was not correct.

If the above situation is correct, what do you recommend to the carpet seller that has been collecting and remitting sales tax based on the selling price of the carpet since November?

The amendment to 86 Ill. Adm. Code 130.1940 regarding the taxation of rugs and carpeting that you cite was effective November 25, 1998. There were simultaneous revisions to 86 Ill. Adm. Code 130.1951 and 130.1952 that covered the same subject. These amendments were published at 22 Ill. Reg. 21642. The Department promulgated these revisions to clarify which methods of carpet installation we consider to be permanent installation into real estate.

As you know, persons who take tangible personal property and permanently affix it to real estate in Illinois act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. They owe Use Tax because they are considered the end users of the materials they take off the market to permanently affix to real estate, G. S. Lyon & Sons Lumber & Mfg. Co. v. Department of Revenue, 23 Ill.2d 180 (1961). See also 86 Ill. Adm. Code 130.1940(b)(2) and (c).

The recent amendments about rugs and carpeting were made because of changes in installation methods that had occurred since the original rules were developed. For instance, the method of affixing carpet to unfinished floors by impaling it over nail-filled wood stripping installed around the edges of the room has become widespread.

Under the prior regulations, carpeting was considered to be permanently installed into real estate only when cemented or otherwise permanently affixed to the structure. Carpeting installed by "tacking" was not considered to be permanent affixation. Carpeting and other floor coverings sold and installed by tacking was considered a sale of tangible personal property by the contractor subject to Retailers' Occupation Tax based upon the contractor's gross receipts attributable to the sale of the carpeting.

Under the new amendments, permanent affixation of floor coverings includes those installed by use of tacks, staples, or wood stripping filled with nails that protrude upward (sometimes referred to as "tacking strips" or "tack down strips"). However, permanent affixation does not include floor coverings that are area rugs or that are attached to the structure using only two-sided tape.

For an explanation in a published article about the tax consequences of the changes see the Spring 1999 edition of the Fed-State Tax Review. This article is entitled *Illinois Department of Revenue Announces Changes to Regulations* and is available on the Department's Home Page at www.revenue.state.il.us.

If a retailer has collected and remitted tax based upon a mistake of fact or error of law the retailer may file a claim for credit with the Department pursuant to 86 Ill. Adm. Code 130.1501, enclosed. Only the remitter of the tax erroneously paid to the Department is authorized to obtain a refund. In order to obtain a credit, one must first demonstrate that he or she has borne the burden of the tax erroneously paid. In the case of retailers making retail sales this means the retailers have unconditionally repaid the taxes to the vendees from whom they collected such taxes.

Please note that the Department has no authority to compel the retailer to file a claim for credit. Whether or not a seller refunds to a customer the taxes paid and files a claim for credit with the Department is a private matter between the retailer and purchaser.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.